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Jacob & Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process, 18 Kansas L.Rev., p. 493 (1970) 30

Justice, Prisoners' Litigation in the Federal Courts, 51 Tex. L.Rev., pp. 707, 712-713 (1973) 31

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Prison Mail Censorship and the First Amendment, 81 Yale L.Jour., pp. 87, 91-92 (1971) 18

8 Wigmore, Evidence, Sec. 2317, p. 618 (McNaughton, Rev. 1961) 25

81 Yale L.Jour., p. 98, fn. 70 .....21, 23, 30

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-679

CHARLES L. WOLFF, JR., et al., *Petitioner,*

VS.

ROBERT O. McDONNELL, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AMICUS CURIAE

This case raises questions basic to the control and operation of the states' prison systems. The California Attorney General has an intense interest in these questions. The California Department of Corrections operates nineteen institutions with a total population of 22,000 adults including 1,000 women. In addition, the California Youth Authority has eighteen institutions with a population of 4,500. These institutions range from maximum security to honor camp and

work furlough program. Moreover, there are over 18,000 inmates on parole status.

Much of the litigation in the prison context has arisen in California and virtually every aspect of the operation of this system has been put into issue in the state and federal courts. See for example *Martinez v. Procunier,* No. 72-1465 (presently before this Court) involving mail and paralegal visiting privileges and inmates' right of access to the courts; *Procunier v. Hillery,* No. 73-754, and *Pell v. Procunier,* No. 73-918 (probable jurisdiction noted), inmate and media rights of interview and *Clutchette v. Procunier,* 328 F.Supp. 767 (N.D. Cal. 1971) (Presently before the United States Court of Appeals for the Ninth Circuit), involving the whole question of prison disciplinary procedures. In addition, there has been extensive litigation in the California state courts particularly involving the application of the protections outlined in *Morrissey v. Brewer,* 408 U.S. 471 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), to procedures within the prison environs.

We believe that the problems we face and the solutions the Department of Corrections has advanced will be of interest to the Court.

SUMMARY OF ARGUMENT

In the case of prison disciplinary hearings we argue that a fact finding system based upon an investigation by an independent officer, notice and opportunity to

be heard before an impartial tribunal, the right to present evidence, to receive written findings from the tribunal and to have speedy administrative review, combined with access to the state courts to prevent arbitrary or capricious action, presents the best balance between the nature of the governmental function and the private interests involved. The right to counsel and to cross-examine would not enhance the fact finding process in this peculiar environment and would militate against the prompt and just settlement of rule infractions. But whatever the federal due process right, prison authorities should be required first to delineate minimum standards.

In the case of attorney mail, a balance must be struck between the possible catastrophe of violent escape and possible effects on the right of access to the courts and the constitutional right to counsel in criminal cases. We point out that opening but not reading such mail in the inmates' presence does not even minimally affect any fifth or sixth amendment rights and we document that it substantially assists the prison authorities in dealing with an existent threat.

We suggest some specific guidelines by which Nebraska's inmate assistance program could be judged and finally we argue that whatever standard of due process rights is applied, the factor of "purpose" does not mandate retroactive application whereas the factors of "reliance" and "effect" are strongly in favor of purely prospective application.

ARGUMENT

I

UNDER WHAT CIRCUMSTANCES IF ANY SHOULD THE RIGHT TO COUNSEL BE EXTENDED TO PRISON DISCIPLINARY HEARINGS?

Amicus curiae, the People of the State of California submit that there is no right to counsel at prison disciplinary hearings.[1] We urge that procedures utilizing an independent investigating officer to ascertain the validity of the charges, giving notice of the charges, affording an opportunity to explain and to present evidence on one's own behalf provide sufficient due process in the circumstance, and represent a proper balance between the rights of prisoners[2] and the purposes of officials charged with the responsibility of keeping and rehabilitating those prisoners. These concepts take into account the inherent differences between free society and the prison society; find legal basis in *Braxton v. Carlson,* 483 F.2d 933, 941 (3rd Cir. 1973), and *Sostre v. McGinnis,* 442 F.2d 178 (2nd Cir. 1971); and are consistent with the related matters decided in *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972) (question of counsel not decided), and *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973) (pres-

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[1]"Disciplinary hearings" as used here refers to hearings inquiring into violations of inmate regulations for which punishments such as segregation and loss of privileges may be imposed. The term does not refer to prosecution of criminal offenses nor to hearings for revocation of good time credits or refixing the term of confinement.

[2]Although only the right to counsel is at issue our argument is framed in terms of full due process including the right to confront and cross-examine.

ence and participation of counsel undesirable and constitutionally unnecessary at most revocation hearings).

> ". . . [D]ue process is flexible and calls for such procedural protections as the *particular situation* demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the *precise nature of the government function* involved as well as of the *private interest* that has been affected by governmental action." *Burger, C.J.* in *Morrissey v. Brewer, supra,* at 481. (Emphasis added.)

A. "The Particular Circumstances."

The elements of due process frequently come in a package comprised of notice, impartial hearing, cross-examination, the right to present evidence on one's own behalf, and counsel.[3] This package is usually formulated in the context of a citizen in a free society. Thus, whether the proceedings involved welfare benefits, *Goldberg v. Kelly,* 397 U.S. 254 (1970), or fire marshal investigations, *In re Groban,* 352 U.S. 330 (1957), essential to the result was the assumption that the society, individually and collectively, would not only accept these due process rights but also would discharge the obligations which correspond to them. We note that in *Morrissey* and *Gagnon* due process was evaluated in the context of a free society, *i.e.,* the parolee's environment.

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[3]Even in the free society context, the right to counsel is not always upheld. *In re Groban,* 352 U.S. 330 (1957), *see also Gagnon v. Scarpelli,* 411 U.S. 778 (1973).

By marked contrast, the Court is now asked to extend this familiar package not only to individual prison inmates who have established beyond reasonable doubt their inability to accept the obligations and responsibilities of due process,[4] and who have not yet demonstrated the ability to reach parole status, but more importantly, it is also asked that the rights be upheld in a prison environment entirely unlike that in which the concepts of due process evolved over centuries. It is now demanded that all prison inmates be afforded rights of cross-examination and counsel in disciplinary hearings when experience and indication is that they would not, or if they would, dare not respond with the cooperation and integrity necessary to give meaning to the fact finding process.[5] We ask that this Court recognize that fact finding by the in-

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[4]"In considering plaintiff's claim that the disciplinary procedure at Green Haven denies him due process, we recognize that prison officials are not dealing with a group of genteel citizens noted for their law-abiding characteristics. On the contrary most present a constant threat of unruliness and have already engaged in serious anti-social activities leading to their imprisonment." *Carothers v. Follette*, 314 F.Supp. 1014, 1027 (S.D.N.Y. 1970).

[5]The concept of due process cannot be separated from the nature of the society in which it exists. Although in society at large it is recognized that an individual may often have conflicting loyalties and interests, the law presumes that the diverse interests of society will outweigh such factors, and a fair hearing will result. But how can this system function in prison where each inmate's conduct is entirely governed, willingly or otherwise, by his obligation to an unwritten internal code of conduct which is directly opposed to the concepts of due process? An inmate, whether assailant, victim, or witness cannot be realistically expected to give any but favorable testimony concerning a fellow inmate. For example, we note that a prisoner of some notoriety (Juan Corona) who lost an eye in a recent prison stabbing attack, will not testify against those believed to have taken part in the attack and criminal proceedings have had to be dismissed. This routinely occurs. See Exhibit 1.

vestigating officer concept will better serve the purposes of confinement than the familiar concepts of truth realization by battle of champions.

Nor do we believe that it is an arbitrary classification to recognize the attitude and conduct of prison inmates in this regard. It does not seem illogical for an inmate to forfeit the basic presumptions of credibility he might possess, if only because he is directly confronted by the conflicting rules of internal prison society.[6] More importantly, there is regrettably no reason to believe that full due process participation by inmates, including confrontation and the right to counsel at prison disciplinary hearings will add to the integrity of such hearings, nor improve the correctional process.[7] If we were permitted to make but

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[6]Because of their code of conduct, the credibility of virtually every inmate is questionable. What reason is there for allowing participation in due process hearings when the participants cannot be believed? It is for this reason that *Goldberg v. Kelly, supra,* is not dispositive of this issue. Accepting the reasoning of that case as applied to its particular circumstances, we submit that the context of welfare payments to free citizens is inherently different from the prison situation, if for no reason other than the nature of the prison environment.

[7]Although the entire battery of due process rights is neither necessary nor workable in the prison disciplinary hearing, we acknowledge that certain rights are appropriate. Indeed, we would be totally oblivious to contemporary concepts of corrections if we failed to recognize the sound reasoning of numerous recent cases calling for expansions of due process in this area. Although in a few instances some type of right to counsel has been granted under certain circumstances, *Palmigiano v. Baxter,* 487 F.2d 1280, 1290-1292 (1st Cir. 1973); *Clutchette v. Procunier,* 328 F.Supp. 767, 783 (N.D.Cal. 1971); appeal docketed No. 71-2357, 9th Cir. August 30, 1971; *Colligan v. United States,* 349 F.Supp. 1233, 1238 (E.D. Miss. 1972); most courts which have reached the issue have declined to rule that there is a right to counsel at prison disciplinary hearings. *Sostre v. McGinnis, supra; Braxton v. Carlson, supra; United States ex rel. Jones v. Rundle,* 358 F.Supp. 939,

one point in this brief, we would urge with the utmost emphasis that the free person's due process right of confrontation and counsel is inappropriate in these "particular circumstances" because inmates function according to their own system of conduct which is inconsistent with the underpinnings of due process, and the purposes of the confinement which they are undergoing.

In any event, the cost would be high. During 1973, there were approximately 22,000 inmates in the nineteen institutions of the California Department of Corrections. During the year there were 20,490 disciplinary hearings. See Exhibit 2. Furthermore these figures do not include the 4500 inmates at California Youth Authority institutions, nor the estimated thousands of inmates at county jails and juvenile detention centers. To afford full due process rights, large numbers of persons would have to be employed just to staff the hearings, and many more would be required to replace correctional personnel called to testify at such hearings.[8] Our position is that the rights advanced by counsel and cross-examination would be minimal as compared to the excessive burden on the

946 (E.D.Pa. 1973); *Collins v. Hancock*, 354 F.Supp. 1253, 1259 (D.N.H. 1973); *Gates v. Collier*, 349 F.Supp. 881, 895 (N.D.Miss. 1972). The foregoing is by no means exhaustive of the recent cases on this issue. Nevertheless, the majority have declined to grant the right to counsel and we believe that they are based on sounder reasoning.

[8]State court decisions in this area may have substantial unexpected side effects. For example, preliminary indications are that recent decisions such as *In re Prewitt*, 8 Cal.3d 470, 503 P.2d 1326 (1972), may have caused a reduction in the number of paroles granted, perhaps due to a new found reluctance to set a parole date until a reasonable certainty of continued inmate rectitude has appeared.

machinery of prison administration, security, and rehabilitation.

B. "Nature of the Governmental Function."

Since the disciplinary hearing is not a criminal prosecution, there is no Sixth Amendment right to counsel, *Kirby v. Illinois,* 406 U.S. 682, 688 (1972). If there is a right to counsel at disciplinary proceedings, it must spring from the due process clause, and

> "[d]ue process of law, as we comprehend it, does not necessarily include or exclude representation by counsel. The substance of due process may be denied although the accused is represented by a coterie of counsel, yet he may have it although unaccompanied by counsel."
>
> *Amrine v. Tines,* 131 F.2d 827, 833 (10th Cir. 1942).

To determine whether counsel is required, the security, deterrent, disciplinary, and rehabilitative functions of the disciplinary hearing must be examined.

A primary responsibility of officers is to prevent escapes, assaults, and other misconduct. The summary disposition of rules infractions is essential to the identification and isolation of potential problems. The major problem can be prevented by prompt and certain response to the minor infraction. The ability to act promptly is essential, and the summary disciplinary hearing serves that purpose well. To subject the proceedings to adversary concepts would formalize and slow the response and seriously impair the ability of prison officials to carry out their responsibility to maintain security.

Discipline is directly related to the concept of security. It is established by knowledge of the inmates that rules infractions will be promptly dealt with. It is diminished by interposing procedural obstacles to prevent its operation. It is also diminished by allowing full confrontation rights and permitting cross-examination and interrogation of prison officials by inmates. There is a need for respect of authority of prison officials which is not enhanced when they are subjected to interrogation by inmates ostensibly designed to show possible bias or prejudice against the inmate.[9] It seems clear that if the right to counsel, who presumably will be bound to exercise his familiar techniques, has any effect on prison discipline, such effect will be neutral at best and adverse in all but the most stable of institutional environments.

> "We believe, therefore, that the transformation of this informal hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses and written record could be self-defeating. We are apprenhesive of the volatile effect such adversarial proceedings could have on internal prison control and stability. We fear that prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point by formal

[9]In 1973, California institutions averaged over 50 disciplinary hearings every day of the year. We see no more need for allowing a prisoner to routinely interrogate his custodian than there is for allowing a serviceman to routinely question the decisions of a commander. As opposed to the normal witness for whom an appearance in court is an event, the staff member must appear many times at disciplinary hearings and must continue to live in a most intimate relationship with the inmate. It is most unwise to strain unduly this continuing relationship. *Cf. Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

adversarial proceedings often involving varying shades of minor infractions."

Braxton v. Carlson, supra, at 941.

The rehabilitory function of the disciplinary hearing has been judicially recognized. A prison disciplinary committee

". . . is not merely a guilt adjudicating disciplinary body. It is also part of the rehabilitation and correctional system for determining the institutional program and service to which the inmate should be referred."

Id. at 939.

In summary, the prison disciplinary hearing is a complex proceeding with separate but interrelated functions. To allow prisoners, through assistance of counsel, to question routinely in formal proceedings the decisions of prison officials in the case of an infraction unrelated to the criminal process would destroy the ability to accomplish several of those functions.[10]

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[10]Because the nature of the disciplinary hearing is essentially non-judicial, we question what use counsel would serve. ". . . . [F]ormal rules of evidence would be entirely inappropriate at a disciplinary proceeding. To dispose sensitively and carefully of each prisoner's unique case with due regard for the effect of each decision on the total fabric of the prison community, prison authorities must have wide access to relevant information. Since, in addition, there is no likelihood that substantial rights would be sacrificed if a prisoner failed, for example, to raise a proper objection or to take a timely appeal, the need for legal skill is less acute here than in *Mempa* . . . ." *Sostre v. McGinnis, supra,* at 196.

At current disciplinary hearings there is neither prosecution nor defense counsel. The proceeding is not adversary but investigative. Imposition of counsel rights would require counsel for both sides and thus require a hearing officer. Equal protection

C. "The Private Interest."

The private interests which may be *directly* affected by disciplinary hearings concern present conditions of confinement for limited periods: isolation, segregation, confinement to quarters, extra duty, and suspension of various privileges. Private interests which may be *indirectly* affected include custody status, access to work assignments, and length of confinement through redetermination of sentence and loss of good time credits.[11]

D. The "Balance."

Although the precise scope of the rights retained by the inmate has never been delineated with precision, it seems fair to say that the nature of the rights retained is necessarily limited by considerations underlying the penal system. *Sostre v. McGinnis, supra,* at 188. There must be a balancing mechanism to weigh the conflicting interests. The criterion is whether the absence of full confrontation rights "lacks support in any rational and constitutionally acceptable concept of a prison system." *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062 (9th Cir. 1973).

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would demand that indigents have appointed counsel. The nature of the entire process would change from summary investigative determination to judicial proceeding. Rather than shaping the hearing to match the function, it would be allowing the hearing to shape the function.

[11]Length of confinement may be indirectly affected because the factual determinations made at disciplinary hearings may be introduced later at hearings on determination of sentence and good time credits. The "good time credit" concept is not applicable in California. Calif. Penal Code section 2926.

The trend for some time has been to place on society the burden of justifying the deprivation of individual rights. However correct that burden in free society, we submit that it is misplaced in the prison environment. Acknowledging that upon conviction a person does not lose all constitutional rights, we nevertheless question the premise that the prison administrator must justify the conditions of confinement. This seems to shift the burden in the matter to the wrong party. It subsumes the concept of a main line inmate as a norm and then proceeds to question the justification for more rigorous confinement. Rather than presuming that prison officials are acting appropriately, it presumes the contrary by requiring them to justify their actions to a reviewing court vis a vis prisoners who have established beyond a reasonable doubt the necessity for their confinement, in an environment where the disinterested non-staff witness is non-existent. We do not assert that prison officials are infallible, nor prisoners incorrigible; however, as between the two, the presumption of correctness must of necessity lie with the officials. We are not dealing with citizens presumed innocent or with ex-felons who have "paid their debt," or even, as in *Morrissey* and *Gagnon,* with parolees who have given indications of rehabilitation by achieving conditional release. We are dealing with incarcerated persons on whom the pressures not to give meaningful cooperation are almost overwhelming. Nevertheless, these persons seek to require society to justify the absence of every procedural due process right. We submit that society discharges the initial burden by showing the fact of

conviction by jury and sentencing to prison by judge, and by demonstrating the general inmate response. The burden is now on the inmates to show why they are entitled and ready to use the rights they seek. An individual inmate can discharge that burden by reaching the conditional freedom of parole. Until such time, we submit that the nature of private interests does not require counsel nor the right to cross-examination when compared against the adverse effect that these would have on the basic purposes of confinement.

II

SHOULD THE STATE PENAL AUTHORITIES OR THE FEDERAL DISTRICT COURT LAY DOWN MINIMUM PROCEDURAL DUE PROCESS REQUIREMENTS FOR DISCIPLINARY HEARINGS IN PENAL INSTITUTIONS IN THE FIRST INSTANCE?

The law on this point has been clearly stated:

> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, *the States have an important interest in not being by passed in the correction of these problems.* Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled

by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances."

Preiser v. Rodriguez, 411 U.S. 475, 491-492 (1973). (Emphasis added.)

". . . [W]e think it inadvisable for a federal court to pass judgment one way or another as to the truly decisive consideration, whether formal due process requirements would be likely to help or to hinder in the State's endeavor to preserve order and discipline in its prisons. . . ."

Sostre v. McGinnis, supra, at 197.

Also see: United States ex rel. Miller v. Twomey, 479 F.2d 701, 713, 719 (7th Cir. 1973); *Biagiarelli v. Sielaff,* 483 F.2d 508, 512 (3rd Cir. 1973).

As previously noted, California has over 25,000 inmates in institutions ranging from maximum security prisons to rural conservation camps. The experienced authorities who operate these diverse institutions are in the best position to prepare regulations for disciplinary hearings tailored to fit the required level. Federal courts should limit their function to striking down unconstitutional regulations and, upon request, offering guidelines for amended regulations.[12] This procedure comports with traditional concepts of our form of government by separating the executive func-

[12]In many instances states have granted greater rights than those required by federal courts. See *In re Prewitt, supra.* If federal courts are to write state procedures in the first instance, it seems likely that the tendency of states to grant additional rights in the future will be reduced.

tion of establishing laws from the judicial function of determining their constitutional validity. Furthermore it adheres to the principles of federal and state comity by recognizing the competence, expertise, and experience of state officials, as well as the requirement that they function effectively in the first instance.

> "Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen state authorities. . . . Presumably that body [the state officials] . . . possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals. . . . it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges. . . ."
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> *Railroad Commission of Texas v. Rowan and Nichols Oil Company,* 311 U.S. 570, 575-576 (1941).

The California Department of Corrections has adopted an elaborate set of regulations pertaining to all aspects of prison administration, including the procedures at issue here. Such regulations were prepared by experienced correctional personnel and are under constant review by State courts. They take into account the capabilities, objectives, and limitations of the Department of Corrections and its numerous institutions, and are compatible with numerous other regulations pertaining to the classification and assignment of inmates. It is our belief that intermittent

code construction by federal district judges will have an adverse effect on the administration and operation of the Department of Corrections, seriously impair the federal state relation, and blur the traditional line between the judiciary and executive. Consequently, the federal courts, in cases affecting the operation of state prison systems, should first require the state prison authorities to delineate the limits of the constitutional process.

III

PRISON OFFICIALS SHOULD BE PERMITTED THE POWER TO OPEN INCOMING ATTORNEY MAIL IN THE PRESENCE OF THE INMATE ADDRESSEE; THE MAIL, UNREAD, SHOULD BE OPENED TO ENABLE THE DETECTION OF CONTRABAND NOT OTHERWISE DISCOVERABLE BY METHODS SHORT OF OPENING.

We again proceed to attempt an identification of the private interests of the inmate and of the nature of the governmental function, and to balance these conflicting interests.

What, initially, are the interests of the prisoner? Although his abstract right to receive *mail* from attorneys carries First Amendment implications, the more operative fact is that it is mail *from attorneys* with which we deal. The Fifth and Sixth Amendment implications are paramount; we sound the themes of access to the courts [insofar as that access is enhanced by *confidential* attorney-inmate communication] and of the general guarantee to "effective" assistance of counsel, *McMann v. Richardson,* 397

U.S. 757, 770-772 (1969),[13] [*if* confidentiality is a constitutionally compelled accouterment thereof in the prison context].

Similarly, there are the interests of society to consider. One interest is internal security. It is a sad fact that the pressing importance of this interest is most graphically demonstrated only after the fact, when security has broken down. Before catastrophe, the need for security is not a need which may be succinctly described; the recourse must be to a largely inarticulable fund of knowledge premised on past experience. Commentators have pointed out that prisons justify their needs only in the most general terms. Note, *Prison Mail Censorship and the First Amendment,* 81 Yale L.Jour. 87, 91-92 (1971); *see also Coleman v. Peyton,* 862 F.2d 905, 906-907 (4th Cir. 1966), *cert. denied* 385 U.S. 905 (1967); *but see Palmigiano v. Travisono,* 317 F.Supp. 776, 783 (D. R.I. 1970). To cavil at the generality of the justification, however, misses the point; the fatal specifics which are reasonably subsumed within that generality are the crux of the matter.

A second such interest is the orderly, daily administration of the prison. The administrators must be given flexibility in the discharge of their duties, for theirs is the intimate contact with the inmates necessary to cause the ultimate rehabilitation of the in-

[13] Even the "general guarantee to assistance" of counsel has been described as of absolute scope only for the defendant in a criminal trial, during that proceeding and through direct appellate review of it. It is not the profession which constrains the privilege but the function.

mates. *Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969). A retort often heard is that such "unfettered" flexibility is inevitably abused. There is an obvious reply: the record herein does not demonstrate such abuse, as the district court specifically noted. 342 F.Supp. at 619. Also, proof of abuse in rare instances does not rebut the general need for flexibility, as it must be presumed until demonstrated otherwise that the flexibility is fairly administered. Abuses, where they are shown to exist, may be rectified, *e.g., Barnett v. Rodgers,* 410 F.2d 995 (D.C.Cir. 1969).

The nature of the "contraband" determines which societal interest is affected in any isolated case. For example, the reception by an inmate of a hacksaw blade is counter-productive to the security interest, and the reception of money by him similarly disrupts the orderly administration of the prison. Thus, it is impossible to determine abstractly the extent to which any societal interest is threatened; it is for this reason also that prison officials can no more than generally outline the interests.[14] To believe otherwise is to

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[14]By definition, our concern is with detection of contraband not otherwise discoverable, as by tactile manipulation, magnetic examination or black light inspection. 342 F.Supp. at 622-623.

It is not clear from the opinion below whether either method could detect drugs on the paper within, especially if the paper were folded over, etc. Such folding would also make impossible the tactile discovery of contraband such as money, hidden within the folds of the letter paper. What may be easily discoverable adhering to the envelope, that is, may not be so if it is adhering to the paper sealed within and folded over. As this brief was in preparation, officials at California's Folsom Prison intercepted two halves of a hacksaw blade enclosed in an envelope containing, appropriately enough, blank habeas corpus forms. The envelope was addressed, by prepaid postage, from the Federal District Court Clerk's Office, Central District of California. The interception

assume they can anticipate the technological advances and weaponry sophistication available as "contraband". *See e.g., United States v. Roche,* 443 F.2d 98, 99 (10th Cir. 1971) (supplemental phallic appendage capable of firing projectile).

Having identified the interests involved, it remains to consider how those interests would be affected by adoption of a particular procedure. How would the interests of both sides be affected were the opposing side's most *extreme* proposition adopted? By analyzing thus, the limits of any effect to be expected would be identified; and the proper constitutional levels of due process delineated.

Custodial personnel might seek to *stop* incoming attorney mail absolutely. The salutary result is obvious: no contraband would reach the prisoner via the mails from attorneys. But what of the effects on the prisoners' rights heretofore identified? If the prisoner may not receive mail from his attorney, the First Amendment problem is obvious, but is better dealt with in other contexts. Certainly no one has yet denied the right of society to read inmates' social mail. [See *Procunier v. Martinez,* No. 72-1465, presently pending.] Less obvious is the asserted Sixth Amendment impingement: the attorney may not fully

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occurred February 22, 1974, in the prison's maximum security section, the *only* section in the prison where scientific equipment capable of such detection was in use. Consequent upon this discovery, other envelopes from the same source were examined and further blades were discovered. Finally, a round carbide blade, normally more difficult to detect under black light examination, was discovered sealed under the flap of the first piece of "confidential mail" from the same court. (This blade's purpose is similar to that of the hacksaw blade, but it is considerably more efficient.)

correspond matters of strategy by mail for fear it will be read by the officials and the contents communicated, presumably to his adversary. *See Adams v. Carlson* 488 F.2d, 619, 630-631 (7th Cir. 1973).

Even if all attorney mail is stopped, however, the Fifth Amendment infringement is not at all clear. Once the Fifth Amendment right of access to the courts is effectively ensured by the appointment of counsel in a particular case, the confidentiality of communication by mail advances the right only marginally. It has been persuasively suggested that the inmates' right of access to the courts is threatened, not by the act of censorship, but by any reprisals prisons may inflict upon the inmate for his reception of mail. *Note,* 81 Yale L.Jour. at 98, fn. 70. Thus, the true Fifth Amendment issue is present only to the extent that reprisals are shown to exist. That showing can be made in only one way, by recourse to the record in the instant case. The district court below found no such reprisals. 342 F.Supp. at 319. An important point emerges: the Fifth Amendment access rights of the prisoner are not threatened here even were Nebraska officials to argue for the most extreme censorship measures.

Inmates would, of course, argue for completely free reception of incoming attorney mail, assuming it to be such.[15] The danger to prison interests from an un-

[15]The opinion of the Court of Appeals considers in haste the problem of so determining, arguing that in doubtful cases, a phone call could be made to the attorney's office. 483 F.2d at 1067; *see also Marsh v. Moore,* 325 F.Supp. 392, 395 (D.Mass. 1971).

Other, more precise procedures could be suggested. First, to be certain an attorney-client relation did exist, *see Elie v. Henderson,*

supervised procedure is that introduction of contraband in incoming mail from attorneys would disrupt prison security and/or internal administration. Courts have not been receptive to the pleas of prison officials, the prevailing feeling being that the danger unscrupulous attorneys will attempt to pass contraband is "remote," given that attorneys are officers of the court and bound by a code of professional ethics. *See, e.g., Adams v. Carlson, supra,* 488 F.2d at 632; *McDonnell v. Wolff, supra,* 483 F.2d at 1067; *Moore v. Ciccone, supra,* 459 F.2d at 578; *Marsh v. Moore, supra; Palmigiano v. Travisono, supra; In re Jordan, supra,* 7 Cal.3d 930, 938-939, 500 P.2d 873.

Thus must be examined the validity of this "assumption". As attorneys, we do this with a profound sense of the delicacy involved. However, to characterize the possibility of miscreant attorney action as "remote" without more is incomplete analysis. It neglects the fact that but *one* miscreant may cause a disaster out of all proportion to his number. That disproportionality, indeed, is the keynote of guerrilla warfare and nuclear disasters. Attorney Stephen Bingham is currently under indictment by a Marin County, California, grand jury for his lone involvement in the San Quentin Prison gun smuggling incident which led to the violence of September 1971, a disaster which left six dead. Another California at-

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340 F.Supp. 958, 960 (E.D.La. 1972), the attorney could be required to register with the prison, submitting a copy of his signature. Second, to minimize the danger of unauthorized usage of his personal stationery, he could be required to write "LEGAL MAIL" and sign on the envelope. *See generally In re Jordan,* 7 Cal.3d 930, 500 P.2d 873 (1972).

torney has been identified in court testimony by convict Ronald Beaty as the source of hacksaw blades which were smuggled into prison via the route of "attorney-client" mail, secreted beneath dummy legal folders. Beaty subsequently escaped, aided by other outside elements, leaving one unarmed prison guard dead. Attached hereto as Exhibit 3 is the testimony of Beaty concerning the incident. [*People v. Burt and Burt,* San Bernardino Superior Court No. CR-28514]. Further, the danger has been judicially recognized. *Elie v. Henderson, supra,* 340 F.Supp. at 960-967; *see also* Note, 81 Yale L.Jour., *supra,* at 99 and fn. 73; *Lee v. Tahash,* 352 F.2d 970 (8th Cir. 1965); *see also* n. 14, *ante.*

In our case, however, it is a middle ground which is before this Court. Nebraska now seeks approval of a procedure whereby incoming attorney mail may be opened in the addressee's presence[16] and inspected for the existence of contraband not otherwise discoverable. It is difficult to perceive a violation of any

[16]The presence of the inmate operates to lessen a Sixth Amendment argument made against the opening of attorney mail. It has been argued that opening mail out of the inmate's presence may make him think the prison officials are seeking to discover the legal details of his defense. As such, the opening may exert a psychological effect on the confidentiality of the attorney-client relationship. *See generally Smith v. Robbins,* 454 F.2d 696 (1st Cir. 1972). If, however, the inmate is present and the letter not read, this psychological barrier dissolves. This procedure is presently allowable under California law. (Cal. Pen. Code § 2600(2); *In re Jordan, supra,* 7 Cal.3d at 938 and fn. 4, 500 P.2d 873.) We would only add that the guard ought to be allowed to compare the signature on the letter with that which, we have suggested (n. 15, *ante*), should be on file with the prison. This provides a final verification that the letter is from the attorney.

The argument is also weakened to the degree [n. 13, *ante*] there is not a right to confidential inmate-attorney communication.

inmates' constitutional rights, no matter how expansively those are stated. The mail is *not* read; the confidentiality problem (if it exists in the abstract), already lessened by the inmate's presence, is nullified. If the fear is the opening itself, without reading, would exert a "chilling effect" on the overall attorney-client relationship, we think that a nebulous supposition. *Cf. Laird v. Tatum,* 408 U.S. 1, 11-14 (1972); *Adams v. Carlson, supra; compare Smith v. Robbins, supra.* But even if abuse or inadvertence occurred, the reader could be prevented from testifying as to the contents. The Fifth Amendment objection is a false one generally; here, it is especially false, as reprisals, which depend upon knowledge of the mail's content, are impossible.

What of the effect of this position on the prison interests heretofore identified? Such a compromise operates in the light of an inescapable fact: it cannot keep out *all* contraband. The task—the real balancing task——is *to reduce to within acceptable limits* the so-called "remote" danger that contraband may be smuggled in through the medium of attorney mail. *Marsh v. Moore, supra,* 325 F.Supp. at 395.[17] The

[17]We must take issue with the district court's requirement that authorities show a "real possibility" the contraband is present. 342 F.Supp. at 625. To so require makes the true balancing process hopelessly one-sided. Given that attorneys in the past have smuggled in contraband and that the potential damage threatened to society in any one case is greater than that to any one inmate whose mail is opened but not read, the added requirement of "real possibility" further skews the balancing toward the prisoner's interests, while totally neglecting those of society. In effect, society is required to articulate a danger which is inarticulable save on the general basis of past experience. An analogous requirement would be one by a court of a "real possibility" that

opening of the envelope and inspection of the letter, *see in re Jordan supra,* 7 Cal.3d at 938-939 500 P2 873; *see also Sostre v. McGinnis, supra,* 442 F.2d at 199-200, reduces to acceptable limits the danger from that avenue of contraband introduction into a prison.

It remains only to articulate the balancing mechanism by which this solution may be defined. Because the primary aspects of this case concern the Fifth and Sixth Amendments, the mechanism must be related to those aspects. Particularly the Sixth Amendment attorney-inmate confidentiality problem, assuming, *arguendo,* the existence of a constitutional right to that confidentiality, must be balanced, again in the context of the prison setting. The proper inquiry is, whether this proposal "lacks support in any rational and constitutionally acceptable concept of a prison system"; *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062, 1065 (9th Cir. 1973); *Sostre v. McGinnis, supra,* 442 F.2d at 199-200, whether it is "unjustified and unreasonable with respect to the needs of prison restraint and discipline." *Wilson v. Prasse,* 463 F.2d 109, 113 (3d Cir. 1972). The procedure this

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anyone entering an oral argument before it is carrying contraband before he be searched for same. However, before oral argument before the California Supreme Court, *all* are searched; the diminution of their Fourth Amendment rights is slight. The justification for the search is more realistically based on California's tragic past experience, rather than on any manufactured concept of "probable cause" or "consent".

We note that this "open and shake" procedure will prevent neither the escape plan nor the obscene nor the calculated appeal to immediate violent insurrection. *Elie v. Henderson,* 340 F.Supp. 958 (E.D.La. 1972). These risks could be obviated by the nomination of a "confidential reader" bound by regulation not to discuss content. See 8 Wigmore, Evidence § 2317 at 618 [McNaughton Revision 1961].

Court ought permit is neither unjustified nor unrelated to those interests, it recognizes the inchoate nature of dangers to those needs. Failure to so recognize is the weakness of the Court of Appeals' holding on the issue, which holding ought now be disavowed. *Compare Sostre v. McGinnis, supra.*

IV

THIS COURT SHOULD PROVIDE GUIDELINES BY WHICH THE QUESTION, WHETHER THE NEBRASKA "INMATE ASSISTANT" PROGRAM IS A "REASONABLE ALTERNATIVE" WITHIN THE CONTEMPLATION OF JOHNSON v. AVERY, 393 U.S. 483 (1969), MAY BE ANSWERED ON REMAND IN THE DISTRICT COURT.

Neither one-word answer which this Court could give to the abstract question presented, whether *Johnson v. Avery,* 393 U.S. 483 (1969), is as applicable to Civil Rights Act cases as to habeas corpus actions,[18] would be responsive to the true shortcoming

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[18]In practical terms, the issue may already have been determined, and *Johnson* applied in the civil rights context. There are few explicit pronouncements, *compare Cruz v. Beto,* 405 U.S. 317, 325 n. 3 (1972) (dissent of Rehnquist, J.) (*Johnson* not applicable beyond habeas corpus context); *Leeper v. Birzgalis,* 314 F.Supp. 808 (W.D.Mich. 1969) (same) *with Sczerbaty v. Oswald,* 314 F. Supp. 571, 573 n. 2 (S.D.N.Y. 1972) (*Johnson* applies to prisoner suits brought under Civil Rights Act), but there are reasons which suggest the issue has already, *sub silentio,* been determined.

a. *Johnson* itself arose in what has subsequently been described as a "civil rights" context. *Dixon v. Jacobs,* 427 F.2d 589, 595 n. 10 (D.C.Cir. 1970); *see also Breard v. Alabama Board of Corrections,* 413 F.2d 455 (5th Cir. 1969) (regulation identical to that struck down in *Johnson* voided in suit brought under 42 U.S.C. § 1983). Since *Johnson,* the distinction between habeas corpus jurisdiction and civil rights jurisdiction has tended to blur, leading to an overlapping applicability of the two actions to many

in the Court of Appeals' opinion. Whichever answer be found to the theoretical issue,[19] the case must still be remanded to the district court for a determination of whether the Nebraska "inmate assistant" program is a "reasonable alternative" (to inmate legal assistance for other illiterate inmates)[20] within the contemplation of *Johnson v. Avery, supra.* The guidelines provided for the making of that determination are so general as to be non-existent. *See* 483 F.2d at 1065. Accordingly, this Court should enunciate the factors relevant to the district court's ultimate exam-

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prison situations. *Wilwording v. Swenson,* 404 U.S. 249, 251 (1971); *but see Preiser v. Rodriguez,* 411 U.S. 493 (1973).

b. This overlapping renders difficult the strict limitation of *Johnson* to habeas corpus, since many prison actions involving a *Johnson* problem are brought under the Civil Rights Act. Federal courts have been quick to further blur the distinction between the two types of action. *See, e.g., Williams v. Richardson,* 481 F.2d 358, 360 (8th Cir. 1973); *Andrade v. Hauck,* 452 F.2d 1071, 1072 (5th Cir. 1971); *Hudson v. Hardy,* 424 F.2d 854, 855 n. 3 (D.C. Cir. 1970); *International Prisoners' Union v. Rizzo,* 356 F.Supp. 806, 808-809 (E.D.Pa. 1973); *Park v. Thompson,* 356 F.Supp. 783, 789 (D.Haw. 1973).

c. The need for access to the courts, the motivation behind *Johnson,* may exist as strongly in the civil rights context as in the habeas corpus context. *In re Reynolds,* 356 F.Supp. 1253, 1256 (E.D.Wis. 1973); *Carothers v. Follette,* 314 F.Supp. 1014, 1022 (S.D.N.Y. 1970); *see Campbell v. Beto,* 460 F.2d 765 (5th Cir. 1972); *Corby v. Conboy,* 457 F.2d 251 (2d Cir. 1972).

[19]This assumes the issue exists at all, since the Nebraska regulation is not absolute, as was the Tennesee regulation considered in *Johnon v. Avery.* This point was noted by the district court below. 342 F.Supp. at 621. Similar "without permission" regulations have been held reasonable under *Johnson. Sostre v. McGinnis,* 442 F.2d 174, 201 (2d Cir. 1971); *Wells v. McGinnis,* 344 F.Supp. 594, 597 (S.D.N.Y. 1972).

[20]*Johnson's* concern is with the illiterate inmate. Access to the courts for literate inmates is guaranteed by the existence of adequate law libraries and writ preparation facilities within the prison. *Younger v. Gilmore,* 404 U.S. 15 (1971). A regulation which permits assistance to "illiterates," but not otherwise, would be proper under *Johnson. But see Wainwright v. Coonts,* 409 F.2d 1337, 1338 (5th Cir. 1969).

ination of the Nebraska "alternative." The enunciation of those factors would have the additional benefit of providing the states with some indication of the form such "reasonable alternatives" ought assume. It must be remembered that it is the states' function to set up a "reasonable alternative" form of legal assistance for illiterate or perhaps inarticulate inmates should they choose to bar any form of assistance by literate inmates, as part of their basic responsibilities for their prison systems. *Preiser v. Rodriguez, supra,* 411 U.S. at 500.

The Court of Appeals held only that, upon remand, it would be the burden of the state to demonstrate a "reasonable alternative" exists,[21] and that the meeting of that burden would require the state to produce ". . . evidence establishing in specific terms *what the need is for legal assistance* . . . in civil rights actions as well as habeas corpus suits." 483 F.2d at 1065 [emphasis in original] [citations omitted]. The above language does not provide the state with any idea of the type of evidence required of it to demonstrate this need; all that is said is that the evidence must be "specific."

What must the state show to carry its burden of demonstrating that a "reasonable alternative" exists; what factors are of importance? The fundamental factor would seem to be the actual size of the *illiterate* inmate population in the particular facility, since

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[21]As a preferred right is involved, this burden has been placed on the state. *Novak v. Beto,* 453 F.2d 661, 664 (5th Cir. 1971), *rehearing denied,* 456 F.2d 1303 (1972); *Dreyer v. Jalet,* 349 F. Supp. 452, 484 (S.D.Tex. 1972).

it is against the backdrop of this statistic that the effectiveness of any program must be evaluated. The importance of that statistic has been noted, Note, *Constitutional Law: Prison "No Assistance" Regulations and the Jailhouse Lawyer,* 1968 Duke L.Jour. 343, 347-348, 360-361 (1968); and updated statistics could be expected.

Once the size of the affected "class" is known,[22] the emphasis must shift to evaluation of the effectiveness of the alternative, in two respects. The first inquiry is as to the delay, if any, which occurs between the time the inmate makes known his desire for assistance and the time his grievance is considered within the prison. *Williams v. United States Dept. of Justice, Bureau of Prison,* 443 F.2d 958, 960 (5th Cir. 1970). Whether a delay of any particular duration is "reasonable" must, of course, be evaluated on a case-by-case basis, given the multitude of correctional facilities and their individualized situations. *Johnson v. Avery* recognized that the state could impose "reasonable" limitations on inmate legal assistance. 393 U.S. at 490. Any alternative can be evaluated in general "reasonableness" terms as to effectiveness in *commencing* to render assistance.

Somewhat more difficult is an evaluation of the effectiveness of the "alternative" in *completing* assis-

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[22]The analytic task is akin to that of determining the class discriminated against in an equal protection of the laws case. If this "class" is not precisely determined, holdings result which find a given number of lawyers for *an entire inmate population* not a "reasonable alternative." *Dreyer v. Jalet, supra,* 349 F.Supp. at 483-484. That holding neglects the literacy of an undetermined percentage of the inmate population.

tance, *i.e.*, getting the inmate's case to court if that is the necessary forum. Many "grievances" must be dealt with summarily; a simple explanation of a previously-unclear rule of fact is the requisite "remedy." *See* Note, *supra,* 1968 Duke L.Jour. at 359; *see also Novak v. Beto,* 453 F.2d 661, 664 (5th Cir. 1971). It would be helpful to know the percentage breakdown of grievances which must go to court, as compared to those which need not. *Novak v. Beto, supra; see generally* Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 Kansas L.Rev. 493 (1970). Once again, the keynote of the evaluation must be "reasonableness."

To some extent, the number of lawyers, law students, or paralegal personnel involved gives an indication of how well the state is carrying its burden of providing a "reasonable alternative." *Cf. Novak v. Beto, supra; Jacob v. Sharma, supra.* If it appears the number of personnel is large enough to handle the illiterate inmate legal need, the burden would shift to the prisoners' position to demonstrate the contrary, as with statistics concerning past legal actions, and the extrapolations to present "need" derived therefrom.

One final point must be recognized: it is "assistance" to gain access to the courts rather than full legal "representation" in the courts which must be furnished the inmate. *Johnson v. Avery, supra,* 393 U.S. at 490; *see In re Harrell,* 2 Cal.3d 675, 688; 87 Cal.Rptr. 504 (1970). The state's obligation does not

extend beyond a fair presentation of the courts of the inmate's factual claim. In either the civil rights context, *see Haines v. Kerner,* 404 U.S. 519 (1972); *see also Cruz v. Beto,* 405 U.S. 319, 322 (1972); or the habeas corpus context, it is that factual presentation which guarantees the court access sought in *Johnson v. Avery, supra.* The tendency, recognized in *Johnson v. Avery,* of inmates to abuse the grievance procedure, *see also United States v. Simpson, supra,* makes most unrealistic any requirement that the state represent the inmate throughout the judicial progress of his action.[23] *Cf. Boyd v. Dutton,* 405 U.S. 1, 7 (1972) (dissenting opinion); *Guajardo v. Luna,* 432 F.2d 1324, 1325 (5th Cir. 1970).

V

NEW FEDERALLY IMPOSED DUE PROCESS REQUIREMENTS FOR STATE PRISON DISCIPLINARY HEARINGS SHOULD BE PROSPECTIVE ONLY.

The fifth question for review by this Court is whether a federal court may impose new due process procedural requirements retroactively. The circuit court opinion in *McDonnell v. Wolff,* 483 F.2d 1059 (8th Cir. 1973), summarily authorized expungement of apparently all disciplinary reports not meeting its new standards, thus giving its decisions full retro-

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[23]This representation requirement is particularly unrealistic in the civil rights action context, given the full, plenary civil nature of such an action. *Cf. Landman v. Royster,* 333 F.Supp. 621, 644 (E.D.Va. 1971); Justice, *Prisoners' Litigation in the Federal Courts,* 51 Tex.L.Rev. 707, 712-713 (1973).

active effect. 483 F.2d at 1064. Considering the immense upheaval this portends for the prison records and administration of a state such as California, we urge close attention to this question.

A. The Case for Prospectivity.

In *Linkletter v. Walker,* 381 U.S. 618, 622-625, 629 (1965), this Court firmly rejected the purely declaratory theory of law. In so doing it placed the question of retroactive versus prospective application of newly declared constitutional requirements on a balance of equities most succinctly expressed in *Stovall v. Denno,* 388 U.S. 293 (1967):

> "The criteria guiding resolution of the question implicate (a) the *purpose* to be served by the new standards, (b) the extent of the *reliance* by law enforcement authorities on the old standards, and (c) the *effect* on the administration of justice of a retroactive application of the new standards." 388 U.S. at 297. (Emphasis added)

See also *Linkletter v. Walker, supra,* at 629; *Tehan v. Shott,* 382 U.S. 406, 410 (1966).

1. "Purpose."

The most important of these factors is the purpose of the new standards. *Desist v. United States,* 394 U.S. 244, 249 (1969); see *Adams v. Illinois,* 405 U.S. 278, 283 (1972). And the purpose most strongly indicating retroactivity is one directed to the very integrity of the fact-finding process, one involving a clear, ineluctable danger of convicting an innocent man. *Linkletter v. Walker, supra,* at 639; *Adams v. Illinois,*

supra, at 280; *Johnson v. New Jersey*, 384 U.S. 719, 727-728 (1966); *Stovall v. Denno, supra*, at 297-298. If the new rule corrects fatally untrustworthy findings and proceedings, it operates retroactively regardless of the inconvenience and reliance on old rules. *Adams v. Illinois, supra*, at 280; *Desist v. United States, supra*, at 251-252.

"Reliance" and "effect," however, have become increasingly important as the Court has recognized both the existence of degree in the assurances of fair proceedings and the multiple, often prophylactic purposes to its new rules. *Desist v. United States, supra; Johnson v. New Jersey, supra*, at 729; *Tehan v. Shott, supra*, at 416; *Michigan v. Payne*, 412 U.S. 47, 51 (1973). Hence, it stated in *Linkletter:*

> "All that we decide today is that though the error complained of might be fundamental, it is not of the nature requiring us to overturn all final convictions based upon it." 381 U.S. at 639-640.

And it most recently reiterated in *Gosa v. Mayden*, 413 U.S. 665 (1973):

> "At the same time, however, the fact that a new rule tends incidentally to improve or enhance reliability does not in itself mandate the rule's retroactive application." 413 U.S. at 680.

See also *Halliday v. United States*, 394 U.S. 831, 832-833 (1969).

To urge the necessity of prospectivity, we therefore need not utterly refute any beneficial effect new rules

may have on the reliability of fact-finding in disciplinary hearings. Some of the due process rights in some cases may *arguendo* enhance the reliability of findings. They may lessen the possibility that man suffer improper loss of privileges or increased custody due to an erroneous determination. However, particularly in a jurisdiction such as California, where orderly fact-finding procedures based on independent staff investigation have long been in effect, the other "purposes" for the imposition of yet more formal disciplinary procedures may be found to be as significant and as desirable. These purposes include: (a) increasing the "visibility" of prison disciplinary proceedings by a record of proceeding or findings of fact so that courts may more easily intervene when it is appropriate that they do so and so that the public may be assured that arbitrariness, if any, can be checked; (b) exercising a cautionary effect on prison administrators to assure fairness in handling matters in their discretion even as *Miranda v. Arizona,* 384 U.S. 436 (1966) (made prospective in *Johnson v. New Jersey, supra*) served to shape police practices; and (c) improving the rehabilitative factor whereby the inmate involved in a discipline incident knows he is treated promptly as well as fairly and that infractions will meet with prompt and measured response. *Braxton v. Carlson, supra,* at 941.

The California experience has been that the fact-finding procedure, based upon reasonable notice, the impartial board, the independent investigative officer, and the opportunity to present the inmates version,

gives rise to reliable findings of fact. These findings are now subject to administrative review by grievance procedure. In addition, inmates have long had recourse to the writ of habeas corpus, and, if appropriate, evidentiary hearings if they were treated arbitrarily or capriciously. *Cf. In re Harrell,* 2 Cal. 3d 675, 684, n. 3, 693; 87 Cal.Rptr. 504 (1970) cert. denied 401 U.S. 914. This continuing ability to challenge the defect which is further remedied by new rules, has often been found significant to the decision to make a rule prospective. See, e.g., *Halliday v. United States, supra,* at 833.

The factor of "purpose" in this case is, therefore, not definitive and a fair resolution of the retroactivity question requires consideration of the factors of reliance and effect.

2. "Reliance."

Case law has given no reliable warning to prison officials of new due process standards. Many cases have required notice and hearing, often including mention of an impartial tribunal. They frequently specifically rejected any claim to counsel or rights of confrontation and cross-examination.[24] Where permitted, some have added nuances such as a verbatim

[24]See, e.g., *Sostre v. McGinnis,* 442 F.2d 178, 194-199 (2d Cir. 1971); *Biagiarelli v. Sielaff,* 483 F.2d 508, 511-512 (3rd Cir. 1973); *Braxton v. Carlson,* 483 F.2d 933, 940 (3rd Cir. 1973); but *cf. United States ex rel. Jones v. Rundle,* 358 F.Supp. 939, 946-947 (E.D. Pa. 1973); *Benfield v. Bounds,* 363 F.Supp. 160, 163-164 (E.D.N.C. 1973) (summarizing law of other circuits); *United States ex rel. Miller v. Twomey,* 479 F.2d 701, 715-717 (7th Cir. 1973); and see reasoning in *Clements v. Turner,* 364 F.Supp. 270, 281-282 (D. Utah 1973).

recording; and some have gone on to require the ability to call favorable witnesses, written findings of fact, and even use immunity.[25] Finally, some few cases have gone so far as to suggest that an inmate may utilize retained counsel or a counsel substitute to effectuate his other rights. They have thereby evoked Equal Protection claims to a right to counsel at all disciplinary hearings, claims still unresolved.[26] The case of *Clutchette v. Procunier*, 328 F.Supp. 767, 785 (N.D. Cal. 1971) which went as far as a right to counsel or counsel substitute was by its own terms stayed pending an appeal (9th Cir. No. 71-2357, August 30, 1971) and is still undecided.

In this swirl of conflicting opinions on the scope of due process at disciplinary hearings, few cases specifically discussed the question of retroactivity; and the few that did discuss it, disagreed. Ranging over the spectrum of possible results, some held new rules prospective to hearings held after the new decision (see, e.g., *Clements v. Turner, supra,* at 282; *Palmigiano v. Baxter, supra,* at 1293) and some imposed full retroactivity (see, e.g., *United States*

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[25]See, e.g., *Collins v. Schoonfield*, 344 F.Supp. 257, 274 (D. Md. 1972); *Collins v. Hancock*, 354 F.Supp. 1253, 1259 (D. N.H. 1973); *United States ex rel. Neal v. Wolfe*, 346 F.Supp. 569, 574-575 (E.D. Pa. 1972).

[26]See, e.g., *Bundy v. Cannon*, 328 F.Supp. 165, 172-173, 176 (D. Md. 1971); *Colligan v. United States*, 349 F.Supp. 1233, 1236-1239 (E.D. Mich. 1972); *Landman v. Peyton*, 370 F.2d 135, 140 (4th Cir. 1966); *Landman v. Royster*, 333 F.Supp. 621, 651-654, 657 (E.D. Va. 1971); *Palmigiano v. Baxter*, 487 F.2d 1280, 1288-1291 (1st Cir. 1973); *Pearson v. Townsend*, 362 F.Supp. 207, 221-224 (D. So. Car. 1973); *Cf. Cottle v. Wainwright*, 477 F.2d 269, 272-273 (5th Cir. 1973); *Wainwright v. Cottle*, 94 S.Ct. 221 (1973).

ex rel. Jones v. Rundle, supra, at 952; *Landman v. Royster, supra,* at 657). Some have utilized a functional variety of partial retroactivity whereby new standards are applied if the disciplinary punishment is still being served or the disciplinary incident is the basis for initiation of new action against an inmate by custodial or parole agencies. (See e.g., *Adams v. Carlson,* 488 F.2d 619, 628-629 (7th Cir. 1973); *Collins v. Hancock, supra,* at 1259; *Colligan v. United States, supra,* at 1239-1240; see especially *In re Harrell, supra,* at 692-693.) In the Ninth Circuit, the case of *Clutchette v. Procunier, supra,* at one point speaks of the 1969 welfare case of *Goldberg v. Kelly*[27] being determinative (328 F.Supp. at 779), then later speaks as if a functional retroactivity will touch only the most recent incidents (at 784), and finally speaks of expungement in terms suggesting total retroactivity of new rules to all disciplinary incidents in an inmate's file (at 785).

Not only have disciplinary cases given no sure guide as to the scope or retroactive application of new rules, but new decisions from this Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) have not warned prison officials of change in disciplinary rules. *Morrissey* by its own terms stated new rules would be applied to future revocations and spoke in the future tense. 408 U.S. at 485-490. It specifically stated:

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[27]397 U.S. 254 (1969).

> "Although the parolee is often formally described as being 'in custody,' the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." 408 U.S. at 483.

Gagnon v. Scarpelli, too, speaks in the future tense. 411 U.S. at 782, n. 4, 787-788, 790. It, too, speaks of protecting liberty. 411 U.S. at 781. And furthermore, it institutes a conditional right to counsel to effectuate the procedures *Morrissey* set forth. 411 U.S. at 783, 786.

In sum, all that prison officials could divine from existing law was a difference of opinion on the process due in disciplinary proceedings. For failing to guess the new procedural rules ultimately imposed, they ought not to be faulted with the severe effects full retroactivity would bring about. *Williams v. United States,* 401 U.S. 646, 663 (1971) (concurring opinion of Justice Brannan); *Adams v. Illinois, supra,* at 283; *Desist v. United States, supra,* at 248.

3. "Effect."

This is not a field where: "That which was constitutionally invalid could be isolated and excised, without requiring the State to begin the entire fact-finding process anew." *Robinson v. Neil,* 409 U.S. 505, 510 (1973). Full retroactivity would have a devastating impact.

In judging retroactivity, this Court has considered it significant that innumerable cases would have to

be reheard, that the State's administration of justice would be tremendously burdened, and that this would occur despite the fact that prior proceedings may have been reasonably accurate and the rights involved subject to scrutiny by the courts. See, e.g., *Linkletter v. Walker, supra,* at 637; *Michigan v. Payne,* 412 U.S. 47, 55 (1973); *Johnson v. New Jersey, supra,* at 730; *De Stefano v. Woods, supra,* at 634-635.

California has well over 22,000 inmates in prison and over 18,500 on parole. Just in the year 1973, California's adult penal institutions had over 20,000 disciplinary incidents serious enough to warrant a report and hearing (Exhibit 2). If new procedural rules were retroactive, we see no check on a widescale demand that all disciplinary incidents in an inmate's file be either expunged or reheard. And this would be demanded on the speculative effect of such incidents on classification and parole matters possibly years removed from the incident itself.[28] Expungement, assuming the millions of man-hours necessary to its completion could be mustered, would substantially hinder prison administrators' informed exercise of discretion regarding classification based on case histories reliably compiled under then-existing rules. Rehearings held long after punishments and reclassifications had occurred would be immensely

[28]Cases such as *McDonnell v. Wolff, supra,* and *United States ex rel. Jones v. Rundle, supra,* at 951-952, have shown an extreme lack of appreciation of the almost impossible burden retroactivity would impose in a large prison system.

costly in time and man-power for the sake of a speculative benefit to the inmate. On the theory that it may possibly affect conditions or duration of their parole, even parolees under such a rule would be entitled to challenge disciplinary incidents in their files which may go back for years.

In conclusion, we submit that the factor of "purpose", including as it does multiple, often prophylactic purposes, does not mandate retroactivity and that the factors of "reliance" and "effect" make it clear that prospective application of new rules is the only equitable result.

B. The Problem of Partial Retroactivity.

The question of partial retroactivity arises due to this Court's occasional application of otherwise prospective rules to certain extant cases. Partial retroactivity has extended the benefit of new rules to cases still pending on direct review, to cases in which trials have not yet begun, to cases in which the tainted evidence has not yet been introduced, and of course to the litigants in the case before the Court. See *Desist v. United States,* 394 U.S. 244, 256-257 (1969) (dissent of Justice Harlan) citing *Linkletter v. Walker, supra; Tehan v. Shott, supra, Johnson v. New Jersey, supra, Fuller v. Alaska,* 393 U.S. 80 (1968); *Stovall v. Denno, supra;* and *De Stefano v. Woods,* 392 U.S. 631 (1968). The doctrine, while pragmatic, has been attacked as an historical accident and as arbitrary. The doctrine's birth was in cases where the Court had already applied the new rule in

question without discussion of retroactivity.[29] Its arbitrariness has been decried in several dissents. See *Desist v. United States, supra,* at 255; *Mackey v. United States, supra,* at 676, 713-714; *Linkletter v. Walker, supra,* at 640-641. As applied to new procedures for disciplinary hearings, the rule of partial retroactivity bogs down in a morass of unanswered problems.

First, the familiar signposts of retroactivity analysis, which have hitherto been utilized in criminal procedure, are not present in a prison disciplinary hearing. For example, "pending on direct review" cannot be used since the direct state court review is usually through writ of habeas corpus and after exhaustion of administrative remedies. A given state prison system may even have no regular institutional appeal. Second, the function and nature of the hearing in question is unlike the criminal trial. It does not look at an isolated criminal event, but perpetually reviews a man's history from every aspect. Its fact-finding component is immersed in an overwhelmingly dispositional purpose. Third, even attempts at func-

[29]See *Linkletter v. Walker, supra,* at 622, noting *Mapp v. Ohio,* 367 U.S. 643 (1961) had already been applied in *Ker v. California,* 374 U.S. 23 (1963); *Fahy v. Connecticut,* 375 U.S. 85 (1963) and *Stoner v. California,* 36 U.S. 483 (1964) and *Tehan v. Shott, supra,* at 409, n. 3 noting that *Griffin v. California,* 380 U.S. 609 (1965) had been applied to *O'Connor v. Ohio,* 382 U.S. 286 (1965). See also "The Supreme Court—1964 Term, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law," Paul J. Mishkin, 79 Harv. L.Rev. 56, 76 (1965); *Linkletter v. Walker, supra,* at 628-629; *Williams v. United States,* 401 U.S. 646, 652 (1971); *Johnson v. New Jersey, supra,* at 732.

tional partial retroactivity (discussed *supra*) present the spectre of interminable litigation. Inmates will claim that an incident in fact serving only as context was really the critical factor that prompted the challenged action. They will claim that a merely contextual incident tipped the balance against them. It might even be claimed that the Court's partial retroactivity rule is being evaded by dishonest description of an incident as context, rather than as initiating or deciding charge. Functional retroactivity is therefore not a workable rule upon which either inmate or prison administrators can confidently rely.

In conclusion, as this Court stated in *Desist v. United States, supra,* at 253, the reasons against full retroactivity mitigate also against partial retroactivity. We, therefore, submit that any new due process requirements should be prospective to disciplinary hearings held after the date of their imposition.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed and the case remanded for further proceedings not inconsistent with the principles argued above.

Dated, San Francisco, California,
March 8, 1974.

EVELLE J. YOUNGER,
Attorney General of the State of California
JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division
EDWARD P. O'BRIEN,
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Amicus Curiae.

(Exhibits Follow)

Exhibit 1

Office Of The District Attorney
Room 155, Hall of Justice
San Rafael, California 94803

Bruce B. Bales
District Attorney

Telephone
479-1100

March 7, 1973

Warden Louis S. Nelson
California State Prison
San Quentin, California

Re: Nathan Ellis, B-28124
Timothy Earl Dudley, B-33524
Willie Smith, Jr., B-22127

Dear Warden Nelson:

I have reviewed the investigative report forwarded by your Department. This is a very close case against Ellis and Dudley due to their discovery in a cell which was out of bounds, containing two screw drivers and other circumstances. There would appear to be no substantial evidence against inmate Smith.

I feel that the evidence, though strong against Dudley and Ellis, is insufficient to take before a jury for the primary reason that the victim refuses to testify. Initially, his refusal was somewhat qualified, but on March 5, 1973, my investigator, D. H. Howell, contacted him at San Quentin to ascertain whether he would or would not testify in this case and was informed by inmate Coumpy that he definitely would

not testify. Another factor involved is that if the informants, who gave information to Officer Spoon and Sgt. Wilkes were actually eye witnesses to the incident, their names could be discovered by the defense if charges were actually filed.

For the above stated reasons we decline to prosecute in this case and the matter is referred back to you for disposition.

Very truly yours,
Bruce B. Bales
District Attorney
Joshua W. Thomas
Assistant District Attorney

JWT:p

Exhibit 2

(Letterhead of
State of California—Health and Welfare Agency
Department of Corrections
Sacramento

Ronald Reagan, Governor)

March 5, 1974

Honorable Evelle Younger
Attorney General of California
300 McAllister Street
San Francisco, California 94102

Dear Sir:

SUBJECT: Population/Disciplinary Statistics—1973.

Records and files in this office, and information received from the various institutions, show the following totals:

Institution	1973 Population	1973 Disciplinary Hearings
Sierra Conservation Center	2,085	1,584
California Conservation Center ...	721	479
California Correctional Institution	1,150	1,314
California Mens Colony	2,616	2,766
California Medical Facility	1,961	1,449
California Rehabilitation Center ..	1,617	1,712
Correctional Training Facility	2,667	3,147
Deuel Vocational Institution	1,505	2,511
Folsom	2,037	1,199
San Quentin	3,096	2,727
California Institution for Men	2,102	940
California Institution for Women ..	929	662
Total	22,486	20,490

Sincerely,
/s/ L. M. Stutsman
for R. K. Procunier
Director of Corrections

Exhibit 3

TESTIMONY OF BEATY

[988] Q. (By Mr. Canty) Did he [a recently released inmate] tell you how he was going to get them to you?

A. Yes.

Q. What did he tell you?

A. That [an attorney] would bring them to me.

Q. [The attorney] is his attorney you mentioned yesterday?

A. His attorney, yes.

Q. Did [the attorney] ever bring any hacksaw blades?

A. Yes, sir.

Q. Do you remember about when that was?

A. I believe it was the latter part of August or the first part of September, to the best of my recollection.

Q. And how did he deliver them to you?

A. They were in an envelope taped and to the back of a manuscript covered underneath a dummy legal document.

Q. In case anybody doesn't know, what is the use of a hacksaw blade in the prison?

A. To saw the bars off for an escape.

Q. And did you give those hacksaw blades to somebody before you left the prison?

A. Before what?

Q. Before you left the prison on October 8?

[989] A. Yes.

Q. Whom did you give them to?

A. Inmate named Palmer.

Q. Do you recall how many blades you received?

A. 24.